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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-885

MARGARITO O. ROMERO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioner MARGARITO O. ROMERO respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 16, 1978.

OPINIONS BELOW

A Memorandum Decision of the District Court for the Northern District of California is appended hereto as Appendix A.

The opinion of the Court of Appeals, not yet reported, appears as Appendix B to this petition. The order of the Court of Appeals, dated November 3, 1978, denying petitioner's petition for a rehearing appears as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 16, 1978. On August 31, 1978, a petition for rehearing and a suggestion of the appropriateness of an *en banc* hearing were filed, pursuant to Rules 40(a) and 35 of the Federal Rules of Appellate Procedure. The petition for rehearing was denied, and the suggestion rejected, on November 3, 1978; and this petition for certiorari was filed within thirty days of this ruling. This Court's jurisdiction to review the case on petition for certiorari rests upon 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether evidence seized by state officers in violation of petitioner's federal constitutional rights, and thereafter acquired by federal officers from the state pursuant to a federal search warrant, should have been excluded from petitioner's federal criminal trial under the rule of *Elkins v. United States*, 364 U.S. 206.

2. Whether federal acquisition of petitioner's illegally seized documents from a cooperating state prosecutor who had been ordered by a state court judge to return them to petitioner was so repugnant to the principles of federalism as to require federal suppression of the evidence.

3. Whether application of the Fourth Amendment exclusionary rule is required where the evidence against peti-

tioner was initially discovered through federal exploitation of an illegal state seizure, notwithstanding the fact that actual physical possession of the evidence was taken pursuant to an eventual federal search warrant served on the state district attorney.

4. Whether, in applying the "independent source" test of *Wong Sun v. United States,* 371 U.S. 471, a District Court may substitute a hypothetical for an actual independent source by invoking the so-called "inevitable discovery" doctrine.

STATEMENT OF THE CASE

In February of 1975 petitioner was engaged in the business of buying precious metals at the M. O. Romero Metal Company in San Bruno, California. At that time the South San Francisco Police Department began investigating allegations that petitioner and his former partner, Hugo Forster, had been receiving stolen gold. (Reporter's Transcript [hereafter cited as "R.T."] 74.) Shortly thereafter the San Mateo office of the FBI assigned an agent to the case, and a joint federal-state investigation was conducted (R.T. 87).

On May 5, 1975, state officers, acting on a search warrant issued by a Municipal Court judge, entered petitioner's place of business and seized all of his business records, embracing over 50,000 documents. These documents were housed in a police garage where they were examined for evidence of criminal conduct (R.T. 100-101). It was conceded by the government in the courts below that the state search warrant, and the seizure thereunder, was unlawful under federal constitutional standards (R.T. 47, 48, 72, 172, 174; Memorandum decision of the District Court, n. 1).

Following the state seizure, FBI officials decided that the documents "had to be checked out," requiring additional manpower (R.T. 150). Accordingly two agents from the San Francisco field office were assigned to the case. In August of 1975 these agents spent approximately a week going over the documents in the police garage (R.T. 110, 154). From this examination they learned of all of the transactions which were eventually included in the federal indictment, and the witnesses (alleged sellers of stolen gold) to these transactions (R.T. 156-157).

Meanwhile a state prosecution had been initiated by grand jury indictment. On March 30, 1976, the Superior Court for San Mateo County granted petitioner's motion to suppress, ruling that the state search warrant was a general warrant, "constitutionally overbroad as to the description of the property to be seized." (Clerk's Transcript Vol. I, 196.) By the time of this ruling the vast majority of the seized documents had been returned to petitioner. Those remaining, which were intended for use in the state prosecution, had been removed to the office of the deputy district attorney handling the case.

Following the suppression order petitioner sought return of these papers, but the district attorney delayed returning them. Meanwhile, Detective Singleton, the South San Francisco police officer who had prepared the defective state warrant, advised FBI Agent Capps, who had examined the documents following the state seizure, of the state court's ruling (R.T. 112), and that the evidence was going to be returned pursuant to that ruling (R.T. 160).

On April 26, 1976, the parties to the state action appeared before the presiding judge to compel return of the documents held by the district attorney. When no agreement was reached as to the form of a return order, the matter was set over for hearing on April 28 before Judge Haverty, who had granted the motion to suppress (C.T. 187). Also on April 26, Agent Capps applied to a United States Magistrate for a search warrant authorizing seizure of the documents from the office of the deputy district attorney. This application had been prepared by Capps with Singleton's assistance (R.T. 130). The Magistrate, who was not advised of the history of the case or of the state suppression order, issued the federal warrant on the same day.

When the parties to the state action appeared before Judge Haverty on April 28, 1976, Agent Capps and an Assistant United States Attorney were present. The latter advised the judge, in chambers, of the existence of a federal warrant for the documents, "to be executed immediately" (C.T. Vol. III, 454). According to an affidavit submitted by the Assistant United States Attorney in the District Court proceedings, the judge "expressed no objection" when so advised (Id. at 454:30-32). Following that discussion, however, Judge Haverty took the bench and "directed return of [the documentary evidence to its] rightful owners" (C.T. Vol. I, 187:18-21, affidavit of petitioner's state counsel). The deputy district attorney, however, immediately thereafter turned the documents over to the FBI agents pursuant to the federal warrant.

In the federal suppression hearing the deputy district attorney, Mr. Pierpoint, testified that he had told Agent

Capps, a few days prior to April 28, 1976, that he would not turn over the suppressed documents without a warrant, for fear he would be held in contempt by the Superior Court if he did so (R.T. 95-97).

Petitioner moved to suppress in the District Court. The court denied the motion, finding that the federal search warrant, and the affidavit in support thereof, were the product of the preexisting federal investigation, and were not tainted by the unlawful state search. While conceding that the earlier federal examination of the documents in state custody was an "exploitation" of the state illegality, the court (1) held that the exclusionary rule should not be applied; and (2) concluded that the information learned through that examination "would have" inevitably have been discovered pursuant to the eventual federal warrant. Following this ruling petitioner waived jury trial and the case was submitted to the court on stipulated facts. Petitioner was convicted on eight counts alleging interstate transportation of stolen gold (18 U.S.C. § 2314), and one count charging conspiracy (18 U.S.C. § 371).

A divided panel of the Court of Appeals affirmed. The majority distinguished *Elkins v. United States*, 364 U.S. 206 (1960), on the ground that, in this case, federal acquisition of the evidence from the state was pursuant to an independently valid federal warrant. Senior Circuit Judge Merrill, dissenting, found *Elkins* indistinguishable from the instant case, and further found the federal acquisition under these circumstances "repugnant to principles of federalism."

REASONS FOR GRANTING THE WRIT

1. THE OPINION BELOW IS IN CONFLICT WITH THIS COURT'S DECISION IN ELKINS V. UNITED STATES, IN EFFECT RESURRECTING THE "SILVER PLATTER DOCTRINE" OVERRULED IN THAT CASE.

In this case petitioner's documents were seized by state officers in a search which concededly violated federal constitutional as well as state standards. Federal officers examined the seized documents and found evidence of wrongdoing. Thereafter a state court judge, finding the seizure illegal, ordered the evidence suppressed and returned to petitioner. Instead of returning it, the state prosecutor turned it over to the FBI pursuant to a federal search warrant served upon his office.

In *Elkins v. United States,* 364 U.S. 206 (1960), this Court overruled the "silver platter doctrine" under which evidence illegally seized by state officers could be handed over to federal officers and was then admissible in a federal criminal trial. Since *Elkins* it has been established that evidence seized by state officers in violation of a defendant's Fourth Amendment rights may not be used to convict him in a federal criminal trial. Yet, we submit, that is precisely what was done in this case.

The District Court, and a majority of the panel on appeal, sought to distinguish *Elkins* on the ground that, in this case, the federal acquisition was pursuant to a federal warrant which was itself untainted by the state's illegality. We are unable to find authority for this distinction in *Elkins,* or in any other reported decision. In

fact the federal acquisition from the state in *Elkins* was by way of a search warrant, issued after a state suppression order. This Court's opinion did not attribute any significance to this fact. There is no indication that the independent validity, or invalidity of the warrant, if viewed in isolation, played any part in the decision. The crucial fact, found unacceptable by the Court, was the acquisition itself. As the dissent below points out, the state, having illegally seized petitioner's documents, was in no position to consent to a federal taking of the papers. Neither, we submit, was it in a position to hand them over pursuant to warrant without offending the *Elkins* rule.

The decision below is entirely inconsistent with *Elkins*, and signals nothing less than a return to the "silver platter doctrine" abandoned in that case. We recognize that eighteen years have passed since *Elkins* was decided, and the Court may wish to reexamine its vitality in the light of subsequent decisions considering the exclusionary rule in the federal-state context. E.g., *United States v. Janis*, 428 U.S. 433 (1976). It may be that federal and state prosecutors and law enforcement officials, seeking guidance in this sensitive area, would welcome such a review. In any event, the decision below cannot be reconciled with the law as it presently exists, and certiorari should be granted to resolve this conflict.

2. THE DECISION BELOW INVOLVES AN IMPORTANT AND SENSITIVE QUESTION OF FEDERAL-STATE RELATIONS WHICH SHOULD BE CONSIDERED BY THIS COURT.

We have set forth, in the Statement of the Case, the manner in which the federal government acquired physical

possession of petitioner's documents from the state. Conceptually, the district attorney as of April 28, 1976, held these papers illegally, subject only to the Superior Court's order that they be returned to their rightful owners. Without informing the federal magistrate of this fact, see *Damitz v. United States,* 495 F.2d 50 (9th Cir. 1974), federal agents sought and were granted a warrant authorizing seizure of the documents from the district attorney. The district attorney had requested the warrant to protect himself against a possible contempt citation. His duty, however, was not to seek protection for himself; it was to carry out his obligations to the Superior Court under whose sole authority he continued to possess the evidence. His conduct, encouraged and promoted by federal agents, unquestionably frustrated and defeated the order of the Superior Court that the suppressed documents be returned to their rightful owners.

This Court has stated that "a healthy federalism depends upon the avoidance of needless conflict between state and federal courts." *Kerr v. California,* 374 U.S. 23, 31 (1963). Few actions, we submit, are more likely to produce such conflict than a process whereby state orders are frustrated and defeated in the manner disclosed here, a procedure entirely inconsistent with the respect accorded state court suppression rulings by this Court in *Stone v. Powell,* 429 U.S. 465 (1976).

Senior Circuit Judge Merrill, in his dissent below, concluded that:

> "Permitting seizure under these circumstances serves to frustrate the state in carrying out its high purpose and the United States should not be a party to such frustration.
>
> * * * *
>
> "The fact that some state officers may be willing to cooperate with federal officials in frustrating the state purpose (as was apparently the case here) cannot affect the result. Where suppression is ordered the state duty is clear and a knowing disregard of that duty by state officers does not serve to wipe it out or justify a federal disregard of it."

We respectfully urge the Court to grant certiorari to consider this important question of federal-state relations, and to provide future guidance to state and federal prosecutors in similar circumstances.

3. THE DECISION BELOW INVOLVES AN IMPORTANT CONSTITUTIONAL QUESTION CONCERNING APPLICATION OF THE EXCLUSIONARY RULE FOLLOWING A CONCEDED EXPLOITATION OF AN ILLEGAL SEARCH AND SEIZURE.

The FBI first learned of all of the transactions eventually charged in the federal indictment when, in August of 1975, two agents spent approximately a week examining the documents in cooperation with the state officers who had seized them. At that time the documents were unlawfully held, having been seized by state officers pursuant to an invalid warrant.[1]

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[1]We do not contend, or intend to suggest, that the FBI was aware at the time of this examination, that the state seizure was unlawful. See Opinion of the Court of Appeals, n. 1. The state court suppression order was not until March 30, 1976, some seven months later.

The District Court agreed that this prolonged, detailed examination constituted an "exploitation" of the state's illegality, but nevertheless declined to suppress, concluding that the Fourth Amendment's exclusionary rule should not be applied. In language adopted by the majority on appeal, the court reasoned that the "potential for intrusive police conduct" in examining evidence seized by another jurisdiction was insufficient to justify application of the exclusionary rule, and that "collateral policy considerations" militated against such application.

We submit that the court's treatment of this question is clearly inconsistent with established constitutional principles. The exclusionary rule, first announced in *Weeks v. United States,* 232 U.S. 383 (1914) remains a cornerstone of judicial concern for the privacy interests of the citizens. In certain contexts, where the issue has been whether the rule should be expanded, *United States v. Calandra,* 414 U.S. 338; *United States v. Janis, supra,* or applied in a way which would shield perjury, *Walder v. United States,* 347 U.S. 62 (1954), the Court has engaged in a process of balancing the deterrent value of the rule against the policy encouraging receipt of all relevant evidence. But no such situation is presented here. Contrary to the trial court's view, petitioner did not ask it to "expand" the exclusionary rule "to encompass even untainted evidence where necessary to discourage egregious police conduct." This characterization of the evidence as "untainted" simply ignores the court's fully supported finding that the agents' examination of the evidence was an *exploitation* of the prior illegality.

The evidence, therefore, *was* tainted and, in the absence of an independent source, the exclusionary rule should have

applied of its own force. The District Court was not, we submit, at liberty to invoke "collateral policy considerations" to defeat application of the rule. Surely this would be clear if the initial unlawful seizure had been by federal, rather than state officers. Under *Elkins, supra,* the fact that two jurisdictions were involved here is of no constitutional significance. As this Court has emphasized, the situation must be viewed as if the initial intrusion had been by federal officers. *Preston v. United States,* 376 U.S. 364, 366 (1964).

We respectfully submit that the decisions below involve significant constitutional issues concerning the exclusionary rule, which should be settled by this Court.

4. TO THE EXTENT THAT THEY PERMIT A HYPOTHETICAL RATHER THAN AN ACTUAL INDEPENDENT SOURCE TO SATISFY THE WONG SUN TEST, THE DECISIONS BELOW ARE IN CONFLICT WITH DECISIONS OF THE COURTS OF APPEALS FOR THE SECOND, FIFTH AND SIXTH CIRCUITS.

There was, in the District Court's decision, a second prong for its holding that the FBI agents' August 1975 examination of petitioner's illegally seized documents did not require suppression. In addition to its conclusion that application of the exclusionary rule was inappropriate in the circumstances ,the court held that suppression was precluded by the fact that the same information learned by the agents through that exploitation "would have" become available under the eventual federal search warrant. The court's actual language was as follows:

> "While evidence derived through exploitation of the state's unlawful seizure is clearly subject to suppression, *Elkins v. United States, supra,* such evidence would inevitably have been discovered pursuant to materials subsequently seized under the federal warrant, and is therefore admissible."

In support of this assertion the court cited, *inter alia,* a note in 74 Colum. L. Rev. 88 (1974), entitled "The Inevitable Discovery Exception to the Constitutional Exclusionary Rules."

Thus we respectfully disagree with the statement of the majority on appeal that the District Court did not "significantly rely upon this doctrine as a basis for its opinion." (Opinion of the Court of Appeals, p. B-6, n. 4.) Having concluded that the agents' examination of petitioner's papers was an exploitation of the prior illegality, and in the absence of any showing of an actual source for the information independent of that examination, the District Court's reliance on a purely hypothetical "independent source" was significant.

Such reliance was also misplaced. In fact courts have consistently rejected efforts to substitute possibilities for actualities in applying the "independent source" test of *Wong Sun v. United States,* 371 U.S. 471 (1963). In *United States v. Griffin,* 502 F.2d 959, 961 (1974) the Sixth Circuit held that:

> "The assertion by police (after an illegal entry and after finding evidence of crime) that the discovery was 'inevitable' because they planned to get a search warrant and had sent an officer on such a mission,

> would as a practical matter be beyond judicial review. Any other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment."

In *United States v. Paroutian,* 299 F.2d 486 (1962) and *United States v. Houltin,* 525 F.2d 943, 949 (1976), the Second and Fifth Circuits respectively rejected in toto the "inevitable discovery" concept, and doubt as to its validity has been expressed in this Court:

> "[I]t is a significant constitutional question whether the 'independent source' exception to admissibility of fruits, *Wong Sun, supra,* . . . encompasses a hypothetical as well as an actual independent source." *Fitzpatrick v. New York,* 414 U.S. 1050, 1051, 94 S. Ct. 554, 555 (1973) (Mr. Justice White, dissenting from denial of certiorari).

Petitioner's research has disclosed no case applying this doctrine in circumstances like this, where there was nothing even remotely "inevitable" about the federal search warrant when the FBI examination actually occurred.

We submit that the Court should grant certiorari to settle an apparent conflict among the circuits, and to resolve this significant constitutional question.

CONCLUSION

For the reasons advanced herein, petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Dated December 1, 1978.

Respectfully submitted,

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(Appendices Follow)

Appendices

APPENDIX A

In the United States District Court
for the Northern District of California

United States of America, *Plaintiff,* vs. Defendant 1: Hugo Forster, Defendant 2: Margarito O. Romero, *Defendants.*	No. CR-76-610 RFP MEMORANDUM OF DECISION

Defendants Hugo F. Forster and Margarito O. Romero are before the court upon an indictment charging them with nine counts of interstate transportation of stolen gold, and one count of conspiracy. The indictment, returned on October 13, 1976, alleges that between January, 1973, and March, 1975, the defendants shipped substantial quantities of stolen gold from the Northern District of California to Chicago, Illinois.

By the instant motions, defendant seeks (1) to suppress evidence seized pursuant to a search warrant; (2) to dismiss the charges against them due to claimed constitutional and statutory speedy trial violations arising out of pre-indictment delay; and (3) to dismiss the indictment because of defects in the grand jury process.

On March 8, 1977, this court denied defendants' motions to suppress and dismiss. The instant opinion will constitute the court's memorandum of decision for the March 8, 1977, order, setting forth the reasons why we have determined defendants' motions to be without merit.

FACTUAL BACKGROUND

The investigation leading ultimately to the instant indictment was initiated by Detective Singleton of the South San Francisco Police Department in February, 1975. The affidavit in support of the federal search warrant recites that Officer Singleton received information that employees of a precious metals refinery had been stealing gold, and that such gold had been sold to defendant Romero who ultimately shipped it interstate. At the time of the alleged transactions, Romero was operating the M. O. Romero Metal Company, while defendant Forster operated a similar firm named Hugo F. Forster and Company. Until June, 1974, Romero and Forster were partners in a firm known as R & F Metals Co.

After an initial investigation, Officer Singleton contacted the Federal Bureau of Investigation, San Francisco Division, and a joint state and federal investigation into the activities of Romero and Forster commenced. State and federal authorities frequently exchanged information within their possession, and otherwise cooperated closely throughout the investigation of defendants.

Ultimately, Officer Singleton applied to the San Mateo Municipal Court for a search warrant directed to the person, automobile and business office of defendant Romero, describing the property to be seized in broad terms, as "[b]usiness records, telephone stubs, check[s] and check stubs, receipts for sales and purchases, and other stolen items consisting of gold, silver, and other precious metals." This warrant was executed by an officer of the South San Francisco Police Department on May 5, 1975. A similar warrant was executed against Forster on June 26, 1975.

Romero was arrested by state authorities on May 5, 1975, while Forster was arrested on June 18, 1975. Both were subsequently indicted for state offenses by a San Mateo County grand jury. Federal authorities continued their investigation, part of which involved examining the materials which had been seized from defendants by the state.

On March 30, 1976, the Superior Court for San Mateo County granted defendants' motion to suppress the evidence seized pursuant to the state search warrants, on the ground that the warrants failed to particularly describe the items to be seized. The prosecution thereafter dismissed all charges against defendant Forster, and all but one count against Romero.

Following the ruling of the Superior Court, counsel for defendants and the district attorney disagreed as to the wording of a proposed order to return the items seized. This dispute was ultimately resolved at an April 28, 1976, hearing of the Superior Court, who then issued the return order. Before return of the evidence could be effected, however, federal agents seized the evidence pursuant to a federal search warrant, issued by a federal magistrate on April 26, 1976, and directed to the office of the district attorney. The federal warrant was sought with the consent of the district attorney, and both the Superior Court and counsel for defendants were apprised at the April 28, 1976, hearing of the issuance and impending execution of the federal warrant.

Defendant's motion to suppress seeks to exclude from evidence the material seized pursuant to the federal warrant, and the fruits thereof. Defendants' speedy trial motion seeks dismissal of criminal charges by virtue of prejudice from the delay between the date of the state arrest to the time of the federal indictment. Finally, defendants attack the indictment itself as being subject to numerous defects in the grand jury process.

MOTION TO SUPPRESS EVIDENCE

Defendants attack the federal search warrant on two primary grounds. First, they contend that the federal warrant is the direct "fruit" of the unlawful state seizure, in that the descriptive terms employed by the federal warrant, making it adequately specific as to the items to be seized, were derived from inspection of the seized documents themselves. Second, defendants argue that, even if the federal warrant is not actually tainted by the state seizure, the evidence must be suppressed as a matter of policy to discourage the use by the federal government of evidence unlawfully seized by the state.

The evidence fails to support defendants' contention that the necessary specificity in the federal warrant derives from examination of the evidence produced from the unlawful state seizure.[1] The federal warrant was more specific than the state warrant in two respects: first, it limited the documents sought to the years 1971-1975; sec-

[1]Upon a motion to suppress, the legality of the search conducted by state officials is independently reviewed by the federal court. *Elkins v. United States*, 364 U.S. 206 (1960). In the instant case, all parties appear to concede that the state search warrant was invalid.

ond, it specified seizure of business records evidencing transactions with named business firms and individuals.

An examination of the *affidavit* attached to the *state* search warrant reveals that the facts permitting adequate specificity in the *federal* warrant were known prior to the state seizure. The business firms and individuals named by the federal warrant fall generally into three categories: (1) the firms owned and operated by defendants; (2) individuals and entities from or to whom defendants allegedly received or shipped stolen gold; and (3) those firms that defendants listed on United States Treasury Department Reports as their gold suppliers.

With one exception,[2] each of the names specified in the federal warrant, and the probable cause with respect to them, was contained in the affidavit attached to the state warrant. The state warrant thus could have been adequately descriptive had state authorities bothered to specify these names on the face of the state warrant itself. Similarly, by essentially restating the facts recited in the state affidavit, and thus known prior to the unlawful seizure, the federal affidavit provided adequate untainted basis upon which to derive the descriptive terms employed by the federal warrant.

The dates specified in the federal warrant are simply the years during which defendants operated their businesses, and testimony before this court on February 22, 1977, estab-

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[2]No reference to the "Motherlode Wood Company" appears in the state affidavit. Testimony of Officer Singleton before this court on February 22, 1977, however, established that this was another name for one of the firms that was named in the state affidavit, and that this information was known prior to the state search.

lished that this information was also known to state and federal authorities prior to the unlawful state seizure.

Defendants urge the court to infer from the fact that the seized documents were viewed by state and federal officers prior to issuance of the federal warrant, and from the fact that the federal warrant encompassed most of the documents found relevant by the state, that the unlawful state seizure must have aided in the preparation of the federal warrant. We are unwilling to draw such an inference in this case, however, in view of the contents of the state affidavit, which fairly supports the federal description, and in view of the corroborative testimony taken at the February 22, 1977, hearing on defendants' motion to suppress.

We therefore conclude that the evidence unlawfully seized by the state was not utilized in the preparation of the federal affidavit or warrant.

Even if the federal warrant was not the fruit of the unlawful state search, defendants contend that the evidence seized thereby must nevertheless be suppressed. The substance of defendants' argument runs as follows. The federal examination of unlawfully seized documents in possession of the state *prior* to issuance of a *federal* warrant was an unlawful search. Allowing federal authorities subsequently to cure such a search by obtaining a warrant based upon information possessed before the illegal search would be to insulate unlawful police conduct from judicial scrutiny. Thus, defendants argue in essence that, even if the evidence sought to be introduced is not strictly the fruit of an unlawful search, the policy considerations underlying the exclusionary rule demands exclusion of the evidence to deter otherwise unreviewable police conduct.

By now it is well established that evidence unlawfully seized does not thereby become "immune" from use by law enforcement agencies. Rather, so long as the evidence derives from a source independent of the prior illegality, it may be admitted into evidence. *Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920); *Wong Sun v. United States,* 371 U.S. 471 (1963). In general, therefore, our inquiry is limited to that which we have already resolved against defendants, namely, whether the evidence sought to be suppressed was gained through exploitation of a Fourth Amendment violation.

A certain class of cases, however, prove somewhat anomalous under this approach. This is where the authorities have sufficient information to secure a search warrant, but prior to doing so they conduct an unlawful search either to confirm their suspicions, or for some other purpose. See, e.g., *United States v. Griffin,* 502 F.2d 959 (6th Cir. 1974); *Krauss v. Superior Court,* 5 Cal.3d 418 (1971). Since the subsequently obtained warrant is based upon information possessed prior to the unlawful search, it escapes the taint; but the very possession of untainted probable cause provides the police with carte blanche to conduct unlawful searches prior to obtaining a warrant.

United States v. Griffin, supra, involved the unlawful search and seizure of a dwelling by police, while other officers secured a search warrant. Although a warrant based upon previously obtained information was issued and executed, the evidence was nevertheless suppressed. Rejecting the government's contention that the evidence unlawfully seized would have been "inevitably discovered" pursuant to the search warrant, the court concluded that

exclusion of the evidence was the only practical means of deterring unlawful police conduct.

Krauss v. Superior Court, supra, reached the opposite result. There, police had probable cause to obtain a warrant but prior to doing so conducted a warrantless search to confirm their suspicions. The court concluded that the evidence was admissible as based upon sources independent of the unlawful search. "To hold otherwise would go beyond excluding evidence unlawfully obtained and in effect grant petitioner immunity from prosecution because of the officer's collateral wrong." 5 Cal.3d at 423. Cf. *Wayne v. United States,* 318 F.2d 205, 209 (D.C. Cir. 1973) *cert. denied* 375 U.S. 860; *United States v. Bravo,* 403 F. Supp. 297 (S.D. N.Y. 1975).

In deriving the outer perimeters of the exclusionary rule, courts have been guided largely by a reasoning process which balances the deterrence value of excluding a particular class of evidence against the policies in favor of admitting all evidence relevant to the fact-finding process. Thus the exclusionary rule, even as applied to the direct fruits of unlawful police activity, has been circumscribed in a variety of contexts in which the deterrence principle alone might logically be deemed to apply.[3] Analogously, the issue presented by *Griffin* and *Krauss* is whether the rule ought to be *expanded* under certain circumstances to encompass even untainted evidence where necessary to deter egregious police conduct.

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[3]See e.g., *United States v. Calandra,* 414 U.S. 338 (1974); *Harris v. New York,* 401 U.S. 222 (1971); *Walder v. United States,* 347 U.S. 62 (1954). The requirement of "standing," *Alderman v. United States,* 394 U.S. 165 (1969), and the doctrine of harmless error, *Chapman v. California,* 386 U.S. 18 (1967) also derive in part from these considerations.

Krauss and *Griffin* involve circumstances inviting intentional and extensive violation of Fourth Amendment rights through police practices without independent justification. Even were we inclined to apply the exclusionary rule in the context of these cases, we would find the instant case to be distinguishable.

Had the state's seizure of defendants' papers been lawful, federal examination of that evidence while in the possession of the state would not have constituted an independent "search" necessitating the execution of a search warrant. See *U.S. v. Gargoeto,* 476 F.2d 1009 (6th Cir. 1973), *cert. denied* 421 U.S. 987; *U.S. v. DeBerry,* 487 F.2d 448 (2d Cir. 1973); *Gullett v. U.S.,* 387 F.2d 307 (8th Cir. 1967), *cert. denied* 390 U.S. 1044; *U.S. v. Nugent,* 389 F. Supp. 817 (W.D. Louisiana 1975); but Cf. *U.S. v. Birrell,* 470 F.2d 113, 117 (2d Cir. 1972). This rule appears largely designed to avoid complex procedural barriers to cooperation between state and federal law enforcement authorities. Its theoretical underpinning must be that examination by another law enforcement agency is not a sufficiently distinct intrusion into the defendants' privacy to trigger the requirements of the Fourth Amendment.

While federal examination of documents unlawfully seized by the state is clearly an "exploitation" of the *state's* unlawful seizure, the fruits of which are barred from federal court, *Elkins v. United States,* 364 U.S. 206 (1960), whether such conduct prior to suppression by the state court constitutes a federal "search," and thus an independent violation of the Fourth Amendment, is less than clear. The analogy to *Krauss* and *Griffin* may fail for this reason alone. In any event, it is evident that the

potential for intrusive conduct by police under the circumstances of the instant case is vastly less than sanctioned by *Krauss* and rejected by *Griffin*. See *United States v. Bacall*, 443 F.2d 1050, 1057 (9th Cir. 1971). Nor do we believe that this procedure furnished a significant incentive for the initial unlawful search by state authorities.

Moreover, collateral policy considerations militate against application of the exclusionary rule in this context. Before utilizing evidence seized by the state, federal authorities under such a rule would be obligated to conduct an independent inquiry and evaluation into the lawfulness of a state seizure. Where doubt as to legality persisted, federal authorities would either have to suspend their investigation until the completion of suppression proceedings, or seize or subpoena the evidence while it was still the subject of proceedings before the state courts. We think that the effects of the rule urged by defendants would be unduly burdensome in either case, while only marginally protective of rights secured by the Fourth Amendment.

We therefore conclude that this case is inappropriate for application of the exclusionary rule.

The other grounds proffered by defendants for suppression of evidence do not necessitate an extended discussion. We see no conduct of federal or state officials justifying exercise of the court's "supervisory power over the administration of criminal justice" to exclude evidence. Nor do we view the government's failure to inform the United States Magistrate that the evidence to be seized had been suppressed by the state as a basis for invalidating the warrant. Finally, the rationale of *Stanford Daily v. Zurcher*,

353 F. Supp. 124 (N.D. Cal. 1972), *aff'd* 74-3213 (9th Cir., February 2, 1977), is inapplicable to the facts of this case, inasmuch as the warrant was executed upon the district attorney with his prior knowledge and consent. We see no reason to suppress evidence for failure of federal prosecutors to obtain a subpoena under these circumstances.

Defendants' motion to suppress evidence seized pursuant to the search warrant issued by Magistrate Urdan on April 26, 1976, is therefore denied.

As initially framed, defendants' motion to suppress was limited to the materials seized pursuant to the federal search warrant. At the hearing on defendants' suppression motion, however, defense counsel indicated an intention to expand their motion to suppress to encompass not only evidence seized pursuant to the federal warrant itself, but also any "fruit" of the pre-warrant federal examination of evidence unlawfully seized by the state. Defendants did not specify precisely what evidence they deemed to be so tainted, but alluded generally to witnesses who were discovered through use of information contained in the seized documents.

While evidence derived through exploitation of the state's unlawful seizure is clearly subject to suppression, *Elkins v. United States, supra,* such evidence would inevitably have been discovered pursuant to materials subsequently seized under the federal warrant, and is therefore admissible. See *Wayne v. United States, supra; United States v. Seohnlein,* 423 F.2d 1051 (4th Cir. 1970), *cert. denied* 399 U.S. 913; *United States v. Schipani,* 414 F.2d 1262 (2d Cir. 1969), *cert. denied* 397 U.S. 922; Note, "The Inevitable

Discovery Exception to the Constitutional Exclusionary Rules," 74 Colum.L.Rev. 88 (1974). We do not understand defendants to contend that the government discovered evidence during its pre-warrant examination of materials in the hands of the state that was not later available pursuant to the federal warrant. Defendants' motion to suppress is therefore denied.

MOTION TO DISMISS FOR SPEEDY TRIAL VIOLATIONS

Defendants raise three grounds for dismissal based upon delay prior to their federal indictment: (1) that the date of their state arrests should be deemed the initiation of federal prosecution, and that the interval between that arrest and federal indictment requires dismissal; (2) that the delay caused actual prejudice to defendants' ability to present their defense; and (3) that the Speedy Trial Act (18 U.S.C. §§ 3161 *et seq.*) requires dismissal. Each ground is without merit.

The date of a state arrest does not trigger a defendant's speedy trial rights relative to federal charges subsequently brought to prosecute a parallel federal offense. *United States v. Cordova,* 537 F.2d 1073 (9th Cir. 1976). We see nothing about cooperation between state and federal authorities in the investigation of defendants' activity which would operate to alter this rule. Finally, "[t]here is no indication that the state arrest and prosecution constituted 'a mere "temporary device" used to restrain [defendants] until federal authorities might choose to prosecute. . . .'" Id. at 1076. We therefore conclude that the federal prosecution of defendants was initiated only at the time defendants were indicted on federal charges.

Pre-indictment delay resulting in actual prejudice to defendants' ability to conduct their defense would raise a due process claim, see *United States v. Marion*, 404 U.S. 307 (1971), but we find no such prejudice here. Defendants have suffered financially during the course of state and federal proceedings, but there is no basis upon which to conclude that defendants have been denied a fair trial. The other claimed grounds of prejudice have little or nothing to do with the element of delay.

Finally, defendants can state no basis for dismissal under the Speedy Trial Act, inasmuch as the dismissal provisions of that act do not go into effect until 1979. See *United States v. Cordova, supra*, at 1075, fn. 1.

MOTION TO DISMISS BASED UPON GRAND JURY PROCEEDINGS

Defendants raise numerous grounds for dismissal based upon alleged defects in the grand jury process. We address them in turn.

(1) The grand jury was not "misled" into believing that it was receiving direct testimony rather than hearsay. Cf. *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972). In any event the Ninth Circuit has not adopted *Estepa*. *United States v. Chanen, et al.*, 76-2571 (9th Cir., February 3, 1977).

(2) The indictment may not be attacked on the basis that the evidence before the grand jury did not furnish probable cause. *Costello v. United States*, 350 U.S. 369 (1955); *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974). Although a complete absence of evidence might serve to invalidate an indictment, see *Costello v. United*

States, supra at 364 (Burton J. concurring) and *United States v. Tane*, 329 F.2d 848, 853-54 (2d Cir. 1964), we do not find a complete absence of competent evidence here.

(3) Defendants complain of the prosecutor's failure to present to the grand jury a letter by counsel for defendant Forster containing what the defense viewed as exculpatory evidence. A prosecutor has no duty to produce all evidence in his possession tending to exculpate the defendant. See *Lorane v. United States*, 396 F.2d 335 (9th Cir. 1968), *cert. denied* 393 U.S. 933; *U.S. v. Chanen, et al., supra.* The evidence sought to be presented did not clearly negate guilt or undermine the authority of the grand jury to act, see *United States v. Mandel*, 415 F. Supp. 1033, 1041-42 (D. Md. 1976). In any event, much of what was contained in counsel's letter would not have been properly placed before the grand jury, and we do not believe that the prosecutor was obligated to edit it in order to isolate what might appropriately have been presented.

(4) We find no basis upon which to conclude that the prosecutor knowingly used perjured testimony to secure indictments from the grand jury.

(5) We see no activity of the prosecutor which would give rise to a colorable claim that the indictments were a product of improper motives. Cf. *United States v. DeMarco*, 401 F. Supp. 505 (C.D. Cal. 1975).

(6) Defendants cite no authority for the proposition that each element of the indictment must be specifically defined for the grand jury, and we think that the grand jury was adequately apprised of the nature of the charges by the terms of the indictment itself.

For the foregoing reasons, defendants' motion to dismiss is denied.

Dated: March 21, 1977

/s/ Robert S. Peckham
United States District Judge

APPENDIX B

United States Court of Appeals
for the Ninth Circuit

United States of America, *Plaintiff-Appellee,* vs. Margarito O. Romero, *Defendant-Appellant.*	No. 77-2964
United States of America, *Plaintiff-Appellee,* vs. Hugo Frederic Forster, *Defendant-Appellant.*	OPINION No. 77-2969

[Filed August 16, 1978]

Appeal from the United States District Court
For the Northern District of California

Before: MERRILL, Senior Circuit Judge; SNEED, Circuit Judge; and EAST,* Senior District Judge

EAST, Senior District Judge:

THE APPEALS:

Appellant Margarito O. Romero appeals her judgment of conviction and sentence to custody on eight counts of violating 18 U.S.C. § 2314 (stolen gold transported in interstate commerce) and one count of violating 18 U.S.C. § 371 (conspiracy).

Appellant Hugo Frederic Forster appeals his judgment of conviction and sentence to custody on five counts of violating § 2314 and one count of violating § 371.

We note jurisdiction and affirm.

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

The appeals were consolidated for hearing and disposition.

PROCEEDINGS IN THE DISTRICT COURT:

Romero and Forster were jointly indicted on October 13, 1976. The charges under §§ 2314 and 371 covered the period of November, 1973 through March, 1975. The District Court denied the several motions of Romero and Forster for the suppression of documentary evidence seized under federal search warrants from the possession of state law enforcement officers. The District Court also denied appellants' motions for dismissal on the grounds of speedy trial violations and abuse of the grand jury process. Romero and Forster were tried to the District Court without a jury upon a stipulation of facts and the admission in evidence of the various federally seized documents under illegal seizure challenge. The judgments of conviction and sentences to custody were duly entered. Romero and Forster are each at liberty pending appeals.

FACTS:

During 1973, the United States Secret Service uncovered information that R & F Metals (R & F), Romero and Forster's metal processing business, was shipping gold, believed to have been stolen from a mine in Nevada, to Chicago, Illinois. This information was subsequently provided to the South San Francisco Police Department which had been conducting its own investigation into R & F's gold business triggered by information from a local refinery.

In March, 1975, Detective Singleton of the South San Francisco Police Department contacted the Federal Bureau of Investigation (FBI), which then began its own investiga-

tion of R & F's gold trafficking. The FBI investigation was extensively pursued both on an independent basis and in conjunction with state law enforcement authorities.

The South San Francisco Police Department executed state search warrants upon the premises of Romero and Forster on May 2 and June 17, 1975, respectively, and seized all documents and records pertaining to the manner in which they conducted their businesses. During August and September, 1975, hearings were held in the state court resulting in the prosecutor's agreement to return all items not deemed by him to be relevant to the prosecution. This return was not fully accomplished until early 1976 after contempt proceedings had been instituted by Romero and Forster. Meanwhile, however, the police had segregated the documents deemed to be relevant and moved them from the police garage to Detective Singleton's office. Later, when approximately 70 to 80 percent of the documents had been returned to Romero and Forster, most of those documents retained were transferred from the police department to the prosecutor's office for use in the state prosecution.

In August, 1975 and before Romero and Forster had filed their state court motions to suppress the evidence,[1] the records, at that time still in the police garage, were made available to the FBI and were examined by federal agents in connection with their independent investigation. Additionally, those documents found relevant by the police and transferred to Singleton's office were later re-examined.

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[1]Romero and Forster imply that the FBI was aware that the documents they examined in August of 1975 had been illegally seized. This allegation is incorrect; it was not until late August and September, 1975, that Romero and Forster requested the return of certain documents during *preliminary* state court motions.

On October 22, 1975, Romero and Forster were indicted in the Superior Court for San Mateo County, California for a variety of state offenses.

In late March of 1976, Judge Haverty of that Court suppressed the state search warrants and seizure solely on the ground that the warrants' description of the items to be searched for and seized was too broad.[2] As a result of this ruling, the majority of the case against Romero and the entire case against Forster were dismissed.

On April 26, 1976, the FBI, under authorization of the United States Attorney's office, secured and executed three federal search warrants for Romero's home, Forster's business office, and the office of the state prosecutor.[3]

The federal warrants were supported by affidavits which contained no significant information which was not available to the FBI prior to the issuance and execution of the state warrants. Detective Singleton aided in the preparation of the federal warrants and testified that he gave the FBI only information known to him before the state seizures.

Immediately prior to the execution of the federal warrants, the Assistant United States Attorney in charge of the federal investigation met with Judge Haverty to inform him of the pending search warrants for the state prosecutor's office, Romero's home, and Forster's business.

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[2]The Government conceded below that the state seizures were unlawful under federal constitutional standards.

[3]The state prosecutor handling the case stated that if the federal government wanted the documents in his possession, a search warrant for his office would be required as the documents were technically not in his possession in that he had been ordered by the state court to return the records.

Judge Haverty expressed no objection to the procedure to be utilized by the federal government in order to obtain the records and he did not indicate that he believed seizure pursuant to the federal warrants would violate the spirit of his order suppressing the evidence. On April 28, 1976, Judge Haverty ordered the records returned to their rightful owners.

ISSUES ON REVIEW:

We deem the dispositive issues to be:

1. Did the District Court err in denying Romero's and Forster's motions to suppress the evidence seized under the federal warrants?

2. Were Romero and Forster denied the right to a speedy trial in violation of the Sixth Amendment of the United States Constitution or were they denied due process by reason of prejudicial indictment delay in violation of the Fifth Amendment of the United States Constitution?

3. Did the District Court err in failing to dismiss the cause on grounds of abuse of the grand jury?

DISCUSSION:

I. *Motion to Suppress the Fruits of the Federal Search Warrant.*

Romero and Forster contend that the evidence introduced at trial is the direct "fruit" of the unlawful state seizure and was discovered and utilized through a direct exploitation of the illegal state seizure. As such, they contend, it must be suppressed. Appellants also assert that even if the federal warrant was not tainted by the illegal state seizure, the evidence must nevertheless be

suppressed in order to effectuate the policy behind the exclusionary rule; *i.e.*, the deterrence of official misconduct. *See Stone v. Powell,* 428 U.S. 465, 486 (1976); *United States v. Janis,* 428 U.S. 433, 458-59 n.35 (1976).

In addressing the problem of whether the evidence sought to be suppressed was gathered through exploitation of an illegal search, the District Court, in a scholarly and well analyzed memorandum, applied the legal standard expressed in *Wong Sun v. United States,* 371 U.S. 471 (1963), and *Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920),[4] and concluded:

> "By now it is well established that evidence unlawfully seized does not thereby become 'immune' from use by law enforcement agencies. Rather, so long as the evidence derives from a source independent of the prior illegality, it may be admitted into evidence."

We agree with that premise. In *United States v. Ceccolini,* ..... U.S. ....., No. 76-1151 (March 21, 1978) (Slip Op. pp. 5 & 6), the Court stated:

> "The constitutional question under the Fourth Amendment was phrased in *Wong Sun* . . . as whether 'the connection between the lawless conduct of the police and the discovery of the challenged evidence has become "so attenuated as to dissipate the taint."' *Id.* at 487, 491. The question was in turn derived from the Court's earlier decision in *Nardone v. United States,* 308 U.S. 338, 341 (1939), where Mr. Justice Frankfurter stated for the Court:
>
> "'Here, as in the *Silverthorne* case, the facts improperly obtained do not "become sacred and inac-

[4]Appellants' complaints concerning the District Court's asserted reliance on the "inevitable discovery rule" are unfounded. In any event, the District Court did not significantly rely upon this doctrine as a basis for its opinon.

> cessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it" simply because it is used derivatively. 251 U.S. 385, 392.
>
> "'In practice this generalized statement may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint.'"

On the factual issue of the illegal action taken by the state and any possible taint, the District Court found:

> "An examination of the *affidavit* attached to the *state* search warrant reveals that the facts permitting adequate specificity in the *federal* warrant were known prior to the state seizure. . . .
>
> ". . . Similarly, by essentially restating the facts recited in the state affidavit, and thus known prior to the unlawful [state] seizure, the federal affidavit provided adequate untainted basis upon which to derive the descriptive terms employed by the federal warrant." (Emphasis in original).

The District Court concluded therefrom "that the evidence unlawfully seized by the state was not utilized in the preparation of the federal affidavit or warrant."

Viewing the evidence in the light most favorable to the Government, *Glasser v. United States,* 315 U.S. 60 (1942), we agree with the District Court's findings that the federal warrant was based on information obtained prior to the execution of the state warrant and was untainted by the illegally seized evidence.

Romero and Forster assert that even if the evidence seized under the federal warrant is found not to be the fruit of the invalid state search, the evidence must nevertheless be suppressed.[5] They contend that the federal warrant is merely an attempt to cure a prior illegal search and that policy considerations underlying the exclusionary rule demand exclusion of the evidence to deter otherwise unreviewable police conduct.

In this vein, the District Court proceeded to evaluate the potential for unlawful searches despite an independent factual basis for the search:

> "A certain class of cases, however, prove somewhat anomalous under this approach. This is where the authorities have sufficient information to secure a search warrant, but prior to doing so they conduct an unlawful search either to confirm their suspicions, or for some other purpose.
>
> . . .
>
> "*United States v. Griffin,* [502 F.2d 959 (6th Cir. 1974)], involved the unlawful search and seizure of a dwelling by police, while other officers secured a search warrant. Although a warrant based upon previously obtained information was issued and executed, the evidence was nevertheless suppressed. Rejecting the government's contention that the evidence unlawfully seized would have been 'inevitably discovered' pursuant to the search warrant, the court concluded that exclusion of the evidence was the only practical means of deterring unlawful police conduct.

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[5]Romero and Forster's contention that the FBI should have proceeded by way of a subpoena duces tecum rather than a search warrant is unfounded. *Zurcher v. Stanford Daily,* 46 U.S.L.W. 4546 (U.S. May 31, 1978).

"*Krauss v. Superior Court,* [5 Cal.3d 418 (1971)], reached the opposite result. There, police had probable cause to obtain a warrant but prior to doing so conducted a warrantless search to confirm their suspicions. The court concluded that the evidence was admissible as based upon sources independent of the unlawful search. 'To hold otherwise would go beyond excluding evidence unlawfully obtained and in effect grant petitioner immunity for prosecution because of the officer's collateral wrong.' 5 Cal.3d at 423. Cf. *Wayne v. United States,* 318 F.2d 205, 209 [(D.C. Cir.), *cert. denied,* 375 U.S. 860 (1963)]; *United States v. Bravo,* 403 F. Supp. 297 (S.D. N.Y. 1975).

"In deriving the outer perimeters of the exclusionary rule, courts have been guided largely by a reasoning process which balances the deterrence value of excluding a particular class of evidence against the policies in favor of admitting all evidence relevant to the fact-finding process. Thus the exclusionary rule, even as applied to the direct fruits of unlawful police activity, has been circumscribed in a variety of contexts in which the deterrence principle alone might logically be deemed to apply.[3] Analogously, the issue presented by *Griffin* and *Krauss* is whether the rule ought to be expanded under certain circumstances to encompass even untainted evidence where necessary to deter egregious police conduct.

"*Krauss* and *Griffin* involve circumstances inviting intentional and extensive violation of Fourth Amendment rights through police practices without independent justification. Even were we inclined to apply the exclusionary rule in the context of these cases, we would find the instant case to be distinguishable.

"Had the state's seizure of defendants' papers been lawful, federal examination of that evidence while in the possession of the state would not have constituted an independent 'search' necessitating the execution of a search warrant. See *U.S. v. Gargoeto* [*sic.*], 476 F.2d 1009 (6th Cir. 1973), *cert. denied* 421 U.S. 987 [1975]; *U.S. v. DeBerry,* 487 F.2d 448 (2d Cir. 1973); *Gullett v. U.S.,* 387 F.2d 307 (8th Cir. 1967), *cert. denied* 390 U.S. 1044 [1968]; *U.S. v. Nugent,* 389 F. Supp. 817 (W.D. Louisiana [*sic.*] 1975); but Cf. *U.S. v. Birrell,* 470 F.2d 113, 117 (2d Cir. 1972). This rule appears largely designed to avoid complex procedural barriers to cooperation between state and federal law enforcement authorities. Its theoretical underpinning must be that examination by another law enforcement agency is not a sufficiently distinct intrusion into the defendants' privacy to trigger the requirements of the Fourth Amendment.

"While federal examination of documents unlawfully seized by the state is clearly an 'exploitation' of the *state's* unlawful seizure, the fruits of which are barred from federal court, *Elkins v. United States,* 364 U.S. 206 (1960), whether such conduct prior to suppression by the state court constitutes a federal 'search,' and thus an independent violation of the Fourth Amendment, is less than clear. The analogy to *Krauss* and *Griffin* may fail for this reason alone. In any event, it is evident that the potential for intrusive conduct by police under the circumstances of the instant case is vastly less than sanctioned by *Krauss* and rejected by *Griffin.* See *United States v. Bacall,* 443 F.2d 1050, 1057 (9th Cir. 1971). Nor do we believe that this procedure furnished a significant incentive for the initial unlawful search by state authorities.

"Moreover, collateral policy considerations militate against application of the exclusionary rule in this context. Before utilizing evidence seized by the state, federal authorities under such a rule would be obligated to conduct an independent inquiry and evaluation into the lawfulness of a state seizure. Where doubt as to legality persisted, federal authorities would either have to suspend their investigation until the completion of suppression proceedings, or seize or subpoena the evidence while it was still the subject of proceedings before the state courts. We think that the effects of the rule urged by defendants would be unduly burdensome in either case, while only marginally protective of rights secured by the Fourth Amendment."

"[3]See e.g., *United States v. Calandra,* 414 U.S. 338 (1974); *Harris v. New York,* 401 U.S. 222 (1971); *Walder v. United States,* 347 U.S. 62 (1954). The requirement of 'standing,' *Alderman v. United States,* 394 U.S. 165 (1969), and the doctrine of harmless error, *Chapman v. California,* 386 U.S. 18 (1967) also derive in part from these considerations."

Nor does that rationale run afoul of *Elkins* where the "silver platter" doctrine received its death knell.[6] *Elkins* held that "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial."

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[6]The "silver platter" doctrine, a phrase conceived by Justice Frankfurter in *Lustig v. United States,* 338 U.S. 74 (1949), referred to the procedure whereby evidence illegally seized by state officers could be admitted in federal court so long as federal officers did not participate in the illegal seizure. If the state officers illegally seized evidence and handed it over to the federal officers on a "silver platter," it was admissible.

Id. at 223. A federal warrant was issued in *Elkins;* however, it was directed to the bank where local officials had placed the evidence for safekeeping. The affidavit in support of the federal warrant was founded upon the advice and information received on a "silver platter" from state officers after their illegal seizure. The Government never claimed that the evidentiary use of the tape recordings in question was justified under the force of the federal warrant, but only that such use was justified by the "silver platter" doctrine. The opinion in *Elkins* is silent as to the validity or invalidity of the federal warrant and only holds that federal officers in such a situation fall into the shoes of the errant state officers and are subjected to the exclusionary rule. The issue of the purity and viability of an independent federal investigation and gathering of a factual basis of probable cause for the issuance of a warrant was not presented in *Elkins* as indeed there were none.

Here the Government makes no claim of lawful evidentiary use of the evidence seized via the outdated "silver platter" doctrine, but on the contrary, it claims lawful usage of the evidence seized through the force of a valid federal search warrant and seizure based on knowledge from untainted evidence independently gathered and unrelated to the illegal state warrant and seizure thereunder.[7]

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[7]An examination of the record in *Elkins* at the District Court level discloses that while the state officers held possession of the evidence, consisting of reels of wiretap recordings, they invited the federal officers to listen to them. The federal officers did so. Thereafter the state officers placed the tapes in a safe deposit box for safekeeping. In *Elkins,* unlike here, the state court had not ordered a return of the wiretap evidence to any person. In fact, neither Elkins nor co-defendant Clark made any claim to the reels of wiretap recordings.

The Government's failure to inform the United States Magistrate in its affidavit for the federal search warrant that the evidence sought under the federal warrant had been previously suppressed by the state court is not a basis for invalidating the federal warrant.[8] The state warrants were held unlawful because they were general warrants, "on their face constitutionally overbroad as to the description of the property to be seized." That infirmity did not go to a lack of factual establishment of probable cause so, here, a lack of advice about the overbroad state warrants was not material to the Magistrate's finding of probable cause. *See generally United States v. Hole,* 564 F.2d 298 (9th Cir. 1977); *United States v. Taxe,* 540 F.2d 961 (9th Cir. 1976), *cert. denied,* 429 U.S. 1040 (1977); *United States v. Damitz,* 495 F.2d 50 (9th Cir. 1974).

II. *Speedy Trial Rights.*

Forster next raises various contentions relating to delay prior to his federal indictment. As explained in *Arnold v. McCarthy,* 566 F.2d 1377, 1381-82 (9th Cir. 1978):

> "[There are] two separate safeguards against delay in the different stages of the investigation and prosecution of a crime. In the pre-indictment or pre-arrest stage delay is tested by the general proscriptions of due process. . . . Pre-indictment delay is permissible unless it violates 'fundamental conceptions of justice which lie at the base of our civil and political institutions.' *Rochin v. California,* 342 U.S. 165, 173 . . . (1952). [Citations omitted].

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[8] Romero and Forster's reliance on *Younger v. Harris,* 401 U.S. 37 (1971), and their contention that federal prosecution is barred by collateral estoppel are meritless.

> "But once a person becomes 'accused' the more stringent requirements of the Sixth Amendment speedy trial right apply. One becomes 'accused' when there is 'either a *formal indictment or information* or else *the actual restraints* imposed by arrest *and holding to answer a criminal charge . . . .' United States v. Marion,* 404 U.S. 307, 320 . . . (1971). (Emphasis added). At this stage, although standards are still imprecise, the courts have been more willing to find delay to be constitutionally impermissible."

Forster contends that the date of his state arrest should be deemed the initiation of federal prosecution because "a federal prosecution could have taken place as early as the state prosecution." As we held in *United States v. Cordova,* 537 F.2d 1073 (9th Cir.), *cert. denied,* 429 U.S. 960 (1976), the "speedy trial right under the Sixth Amendment [is] not activated until the date of *federal* 'accusation.'" (Emphasis added). *Id.* at 1075.

In *United States v. Marion,* 404 U.S. 307 (1971), the Supreme Court, in dealing with a period of three years between the occurrence of the alleged criminal acts and the filing of the indictment, held that the defendants became "accused" and that the Sixth Amendment protection attached upon the return of a federal indictment. But the Court also ruled that "[i]nvocation of the speedy trial provision . . . need not await indictment, information, or other formal charge." *Id.* at 321. Forster relies on, *inter alia, United States v. DeTienne,* 468 F.2d 151 (7th Cir. 1972), *cert. denied,* 410 U.S. 911 (1973), where the Court stated that "[o]f course, if the crimes for which a defendant is ultimately prosecuted really only gild the charge underlying his initial arrest and the different

accusatorial dates between them are not reasonably explicable, the initial arrest may well mark the speedy trial provision's applicability as to prosecution for all the interrelated offenses." *Id.* at 155. Such a situation was not present in *DeTienne* nor is it to be found here. We agree with the District Court's conclusion that "the federal prosecution of defendants was initiated only at the time defendants were indicted on federal charges."

Lastly, we see no evidence indicating that Forster was prejudiced in his ability to conduct his defense. The District Court recognized the appellants had suffered financially during the state and federal proceedings, but found that "there is no basis upon which to conclude that defendants have been denied a fair trial." We agree.

III. *Grand Jury Proceedings.*

Romero and Forster lastly argue that the grand jury process was abused. They contend that the evidence submitted before the grand jury was insufficient to establish probable cause. Addressing a similar contention in *United States v. Basurto,* 497 F.2d 781, 785 (9th Cir. 1974), we held that:

> "It is clear, however, that when a duly constituted grand jury returns an indictment valid on its face, no independent inquiry may be made to determine the kind of evidence considered by the grand jury in making its decision. *Costello v. United States,* 350 U.S. 359 . . . (1956). To do so would further invade the independence of the grand jury." *See also United States v. Fried,* No. 77-3403 (9th Cir. May 12, 1978) at 1546-47.

We agree with the District Court's statement that "[a]lthough a complete absence of evidence might serve to invalidate an indictment, see *Costello v. United States, supra*

at 364 (Burton, J. concurring) and *United States v. Tane*, 329 F.2d 848, 853-54 (2d Cir. 1964), we do not find a complete absence of competent evidence here." Further, it is well established that a grand jury may return an indictment based solely upon hearsay evidence. *Costello.*

Secondly, Romero and Forster complain of the prosecution's failure to provide the grand jury with a letter from Forster's counsel allegedly containing exculpatory evidence. Contrary to the obligation imposed upon the prosecution at trial, the Government is not required to present all evidence that might be exculpatory to a grand jury. *See Loraine v. United States*, 396 F.2d 335, 339 (9th Cir.), *cert. denied*, 393 U.S. 933 (1968); *United States v. Chanen*, 549 F.2d 1306 (9th Cir. 1977). Regarding the content of the letter, the District Court ruled that "[t]he evidence sought to be presented did not clearly negate guilt or undermine the authority of the grand jury to act, see *United States v. Mandel*, 415 F. Supp. 1033, 1041-42 (D. Md. 1976)." We agree.

The separate judgments of conviction and sentences to custody entered by the District Court on August 10, 1977 are each affirmed.

AFFIRMED.

United States v. Margarito O. Romero—No. 77-2964
United States v. Hugo Frederic Forster—No. 77-2969

MERRILL, Circuit Judge, dissenting:

I dissent from the judgment and from part I of the opinion. I concur with parts II and III. Even as to part I, I agree with much of Judge East's discussion. I have no quar-

rel with the ruling that the federal search warrants were founded on information obtained from sources independent of any tainted examination of the materials improperly seized by the state. I do not question the federal seizures from Romero's home or Forster's business office of documents theretofore returned by the state. I do not contend that the invalidity of the seizure conferred upon the seized materials permanent immunity from seizure. Once suppressed material is back in the hands of the defendants in my view it is once more subject to seizure, assuming that the warrant under which it is seized is free from taint and that the basis for the earlier suppression does not continue to exist. My trouble with part I relates only to the search of the office of the state prosecutor and the seizure of materials found there.

I review the facts briefly. State officers seized documents from the defendants' premises under a defective warrant. The seized evidence was suppressed by court order. The United States then secured a warrant (avoiding the state defects) to search the quarters of the state prosecutor where the suppressed evidence was to be found. The state prosecutor refrained from returning the evidence until federal seizure had been accomplished. In my judgment the order of suppression carrying with it a duty on the part of the state to return the seized documents, rendered those documents immune from federal seizure so long as they remained in the hands of the state officials.

To me this result is compelled by *Elkins v. United States*, 364 U.S. 206 (1960). I am unable to distinguish that case

as Judge East has done on the ground that the federal warrant there was not free from taint as were the warrants here. The Supreme Court placed no reliance on that fact. However, accepting arguendo that the rationale of *Elkins* would permit a distinction on that ground, I still adhere to my view that suppressed materials are immune from federal seizure while they remain in the hands of the state.

I find it repugnant to principles of federalism to allow the United Statees willy-nilly to search state offices and seize from state officials materials held by them as evidence in a state prosecution. Such sharing of evidence certainly should be tolerated only when it comes with the state's consent and willing co-operation. When the state, under a suppression order, is under a duty to return the evidence it is in no position to consent to such a sharing. Permitting seizure under these curcumstances serves to frustrate the state in carrying out its high purpose and the United States should not be a party to such frustration. This was made clear in *Elkins,* where the Court stated:

> "[W]hen a federal court sitting in an exclusionary state admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particulaly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat the state's effort to assure obedience to the Federal Constitution."

364 U.S. at 221.

The fact that some state officers may be willing to co-operate with federal officials in frustrating the state purpose (as apparently was the case here) cannot affect the result.

Where suppression is ordered the state duty is clear and a knowing disregard of that duty by state officers does not serve to wipe it out or justify a federal disregard of it.

I would reverse.

Charles M. Merrill
Circuit Judge

APPENDIX C

In the United States Court of Appeals
for the Ninth Circuit

United States of America, *Plaintiff-Appellee,* vs. Margarito O. Romero, *Defendant-Appellant.*	No. 77-2964 ORDER

Before: MERRILL and SNEED, Circuit Judges,
and EAST, District Judge

In the above case Judges Sneed and East have voted to deny the petition for rehearing and have recommended rejection of the suggestion for a rehearing in banc. Judge Merrill would grant rehearing and recommended rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed.R. App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

The petition for stay of mandate is denied.